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In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.

Appellant,

v.

SEACOAST PRODUCTS, INC., et al.,

Appellees.

Brief Amicus Curiae In Support Of Statement As To Jurisdiction

STATE OF MAINE

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INDEX

Brief Amicus Curiae

	Page
INTERESTS OF AMICUS CURIAE	1
OPINION BELOW	3
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT	3
ARGUMENT	4
I. Virginia's Exclusion of Nonresidents from its Internal Waters Does Not Violate the Equal Protection Clause of the Fourteenth Amendment	4
II. The Bartlett Act, 16 U.S.C., 1081, et seq., Did Not Preempt State Control of Commercial Sea Fisheries and Did Not Supersede State Regulation of Them	5
Conclusion	8

TABLE OF CITATIONS

Cases

McCready v. Virginia, 94 U.S. 391 (1876)	5
Manchester v. Massachusetts, 139 U.S. 240 (1891)	5, 6
Skiriotes v. Florida, 313 U.C. 69, 75 (1941)	5, 6
Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948)	4, 5
Toomer v. Witsell, 334 U.S. 385 (1948)	5, 6
United States v. California, 332 U.S. 19 (1945)	5
United States v. Florida and Texas, S.Ct. No. 54, Original	7

Federal Statutes

	Page
16 U.S.C. 971	7
16 U.S.C. 1081	3, 5
28 U.S.C. 1253	3
28 U.S.C. 2284	3

Federal Constitution

Article VI, ¶ 2	3
Amendment XIV, § 2	3

State Statutes

Maine Rev. Statutes, 12 M.R.S.A. § 4404	1
Virginia Code, § 28.1-60	3, 4
Virginia Code, § 28.1-81.1	3

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BRIEF AMICUS CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION

INTERESTS OF AMICUS CURIAE

When the coastline of Maine is straightened, it measures over 3000 miles in length. The actual configuration is extremely convoluted with countless bays, inlets and estuaries which provide nursery areas and feeding grounds for the State's fisheries. Despite natural advantages offered by this coastline, landings of fish in Maine have declined in recent years and the best scientific information indicates that Maine's coastal fisheries are seriously depleted. One major cause of the depletion of renewable marine resources is the immensely efficient and highly selective fishing effort exercised by foreign vessels and crews beyond 12 miles and by nonresident vessels within Maine coastal waters. Despite the serious consequences of nonresident fishing, Maine at present excludes nonresidents from only the lobster fishery. 12 M.R.S.A. § 4404. Without the authority to exclude nonresidents, this fishery could not be managed because the extreme

length of Maine's coastline makes enforcement of management restrictions possible only with the voluntary compliance of the Maine fishermen. To this point, local adherence to sound management principles has been obtained because the increased production derived from State management restrictions has benefitted local fishermen. If nonresidents cannot be excluded from the benefits of the management cooperation of local fishermen, that cooperation will disappear and the fishery will be seriously depleted. Maine's interest in maintaining a healthy lobster fishery is strong.

The exclusion of nonresidents is necessary to accomplish any rational management objective. To fish in Maine, nonresidents must use boats which can fish long distances from port and which exert effort wherever local conditions are profitable. Historically, distant water nonresident boats have been larger and more efficient than the local fleet which is more limited in range and effort. Because the nonresident fleet is highly mobile, it can exert an extremely unpredictable effort upon the local fisheries. In contrast, the local fleets exert an effort which is nearly constant. Since every management regulation restricting the amount or nature of the fishing on any particular species is based upon an assumption about the amount of effort which will be exerted, the unpredictable exercise of substantial effort by nonresident fleets undermines the objectives of all fisheries management by the State.

The State of Maine has been hard pressed by the pulse fishing capabilities and techniques exercised beyond 12 miles by foreign vessels. Only within the past month have the coastal states succeeded in their effort to persuade Congress to pass legislation which provides the authority to exclude foreign vessels from fisheries utilized by American fishermen. Having so recently obtained this new management opportunity from the legislative branch, it would be ironic for the judiciary to deprive the coastal states of an equally important

management mechanism, the authority to exclude nonresidents from their inland water areas.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on November 7, 1975. It is not yet reported.

JURISDICTION

A final order granting an injunction against the enforcement of §§ 28.1-60 and 28.1-81.1 of the Code of Virginia of 1950, as amended, was entered by a three-judge district court convened under 28 U.S.C. § 2284, on November 7, 1975. The jurisdiction of this Court rests on 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause, Article VI, ¶ 2, and the Equal Protection Clause, Amendment XIV, §2. The statutory provisions are 16 U.S.C. § 1081 and Virginia Code §§ 28.1-60 and 28.1-81.1.

QUESTIONS PRESENTED

1. Whether a state statute which prohibits nonresidents from fishing stocks concentrated in inland waters violates the Equal Protection Clause of the Fourteenth Amendment?

2. Whether the Bartlett Act, 16 U.S.C. § 1081, et seq., preempts state regulation of a documented United States vessel in waters within its marine boundaries?

STATEMENT

The three-judge court held that 28.1-60 of the Code of Virginia of 1953 violates the Equal Protection Clause of the Fourteenth Amendment.

The lower court also held that the Bartlett Act, 16 U.S.C. § 1081, preempted 28.1-81.1 of the Virginia Code of 1950 denying foreign owned corporations any license to fish within Virginia's marine boundaries and "preempted Virginia's control of commercial sea fisheries and superseded state regulation of them".

The lower court's decision raises substantial legal questions and threatens to erode the established scope of the states' authority to manage the fisheries resources within their marine boundaries.

ARGUMENT

I. Virginia's exclusion of nonresidents from its internal waters does not violate the equal protection clause of the fourteenth amendment.

The lower court erroneously concluded that § 28.1-60 of the Code of Virginia of 1950 violates equal protection guarantees by misapplying *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) to the facts of this case. In that case, the court invalidated a California statute prohibiting persons ineligible for citizenship from fishing in territorial waters. The court found the California statute constituted racial discrimination which could not be justified by a "special public interest" in the territorial sea fisheries id. at 420. The *Takahashi* decision does not address the issues in this case because the distinctions drawn by § 28.1-60 of the Virginia Code are not based on racial prejudice but on rational conservation practice, because the Virginia statute applies only to fishing in internal waters, not the territorial sea, and finally because the Submerged Lands Act has substantially enlarged the scope of the states' "special public interest" in the fisheries from that which existed when this court decided *Takahashi*. Thus when *Takahashi* was decided in 1948, the scope of state interest in waters within the three-mile territorial sea was limited by the Supreme Court's decision that the federal government, not the State of California, held paramount rights and power over the territorial sea *United States v. California*, 332 U.S. 19 (1947). Subsequently the Submerged Lands Act granted each coastal state "title to and ownership" as well as the right to manage the fisheries resources within the territorial sea. 43 U.S.C. 1311 (a) (b) (1). The Submerged Lands Act established the state interest in the fisheries resources and substantially weakened the assumption about state interests upon which both *Takahashi* and *Toomer v. Witsell*, 334 U.S. 385 (1948) were decided. The scope of state management authority over the fisheries resources granted by the Submerged Lands Act is a substantial legal question which has never been decided by this Court. It is clear that the lower court's reliance on cases decided prior to passage of the Submerged Lands Act does not settle the issue.

The only Supreme Court decision which does address the states' authority to exclude nonresidents from inland waters is *McCready v. Virginia*, 94 U.S. 391 (1876). In that case, this Court upheld Virginia's right to exclude nonresidents from the exploitation of oysters in inland waters of the state. The menhaden in Chesapeake Bay and most other inland waters are concentrated by inland configurations during certain stages of their life cycle. For the same reasons that the Court permitted the states' exclusion of nonresidents from exploiting oysters in inland waters, it should allow state exclusion of nonresidents from exploiting menhaden or other species which are concentrated there.

II. The Bartlett Act, 16 U.S.C. 1081, et seq., did not preempt state control of commercial sea fisheries and did not supersede state regulation of them.

Citing *Toomer v. Witsell*, 334 U.S. 385, 393, 394 (1948); *United States v. California*, 332 U.S. 19 (1947); *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941) and *Manchester v. Massachusetts*, 139 U.S. 240

(1891), the lower court concluded that the Bartlett Act preempted Virginia's control of commercial sea fisheries and superseded state regulation of them. The decisions cited by the lower court described the scope of the federal government's right to preempt state fisheries regulation prior to the Submerged Lands Act. These cases found that affirmative federal legislation could preempt conflicting state regulation in the territorial sea if there was direct conflict between state and federal regulation. In *Manchester v. Massachusetts*, the court found preemption could occur only when the federal government regulated a specific fishery id. at 266. In *Skiriotes v. Florida*, no preemption occurred even though the federal legislation did regulate a different aspect of the sponge fisheries which was regulated by the state id., at 75. In *Toomer v. Witsell*, the court failed to find preemption where Congress had not regulated the shrimp fishery managed under the authority of South Carolina. Under these decisions, preemption of the states' authority to manage the menhaden fishery has not occurred because the Bartlett Act is limited to the exclusion of vessels not subject to United States jurisdiction and does not purport to establish management restrictions which could conflict with state regulation of the menhaden or any other fishery.

The lower court's total reliance upon pre-Submerged Lands Act decisions of this Court re-emphasizes its lack of awareness of the paramount management rights which the Submerged Lands Act granted the states in the territorial sea. This authority has been carefully protected by Congress in subsequent legislation. In its Brief In Support of the Jurisdictional Statement, Amici Curiae, Virginia Seafoods Council, et al, mention several Federal Acts regulating marine resources which clearly preserve state authority in the territorial sea at pp. 16-18. Other Acts of Congress also establish the intent to preserve state fisheries management authority in the territorial sea. The Atlantic Tunas

Convention Act, 16 U.S.C. § 971, enabled implementation of the recommendations of the International Tuna Commission for Conservation of Atlantic Tunas by providing the Secretary of Commerce the authority to promulgate regulations to conserve the world's depleted tuna stocks. The Act expressly affirms the jurisdiction of the states in the territorial sea, 16 U.S.C. 971 (g) (d) (1) and contemplates state regulation of both United States and foreign vessels, 16 U.S.C. 971 (g) (d) (2). More recently Congress passed the Fisheries Conservation and Management Act of 1976 4R 200 which extends the exclusive fisheries authority of the United States to 200 miles and expressly preserves the jurisdiction of coastal states within the boundaries established by the Submerged Lands Act, sec. 306 (c.) Clearly Congress did not intend the absolute preemption which the lower court concluded the Bartlett Act has achieved. Unless this Court corrects its obvious error, the lower court decision will nullify all management programs now being conducted by coastal states.

The only arguable preemption issue created by the Bartlett Act is whether the state has concurrent authority to regulate foreign vessels within its Submerged Lands Act boundaries. However, this issue is not before this Court because vessels of Seacoast Products Inc. were documented United States vessels within the meaning of the Bartlett Act. If, however, Maine is wrong and the Seacoast Products vessels are foreign vessels which are excluded by the Bartlett Act, the Court should still not summarily conclude that the state authority is preempted. At the present time the extent of Texas' and Florida's authority to regulate foreign vessels and crews within their three league Submerged Lands Act boundaries has been raised by the United States in *United States v. Florida and Texas*, S.Ct. No. 54 Original. One issue in that case is whether the Bartlett Act or the Contiguous Fisheries Zone Act has preempted concurrent state authority over foreign vessels and crews within the ad-

ditional 3-9 mile area the Submerged Lands Act granted Florida and Texas off their Gulf coasts. In that case this Court appointed a Special Master to preside over full discovery and presentation of the evidence. After nearly four years of discovery, the parties are still preparing for trial. Since the Submerged Lands Act grant of management authority over foreign vessels to Florida and Texas in the area between 3 and 9 miles is, if anything, weaker than the authority granted to all states within the traditional three-mile territorial sea, it is unrealistic to assume that the lower court could correctly decide the issue without hearing any evidence. This Court should provide the coastal states which desire to assert concurrent fisheries management authority over foreign vessels at least the opportunity it has offered Florida and Texas to support their authority in this regard.

CONCLUSION

For the foregoing reasons, the lower court's decision creates substantial legal issues of significant importance to the State of Maine. This court should note probable jurisdiction of the issues raised herein.

Respectfully submitted,

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